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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 805

HOUSTON LIGHTING & POWER COMPANY, *Petitioner*,

v.

CITY OF WEST UNIVERSITY PLACE, ET AL., *Respondent*

BRIEF OF RESPONDENT

Opposing Petition for Writ of Certiorari

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 806

HOUSTON LIGHTING & POWER COMPANY, *Petitioner,*

v.

CITY OF WEST UNIVERSITY PLACE, ET AL., *Respondent*

BRIEF OF RESPONDENT

Opposing Petition for Writ of Certiorari

STATEMENT OF THE CASE

The Summary Statement of the Petitioner on page 2 of its Petition for Writ of Certiorari is substantially correct. However, the statement of the Petitioner on Page 1 of such petition to the effect that the Supreme Court of Texas has rendered final judgment in favor of the validity of Ordinance 129 of the City of West University Place, Texas, overruling all questions raised and denying all rights set up and claimed under the Federal Constitution by Petitioner against said ordinance, might be misleading in part. The fact is, the Supreme Court of Texas never found it necessary to pass upon

the alleged Federal questions raised because it evidently did not consider that such questions raised by the Petitioner were substantial in character. The decision of the Texas Supreme Court was predicated upon the inquiry as to the reasonableness of the ordinance in question, and the court held that it was not so unreasonable as a matter of law, as to render it invalid (R. 111).

The statement of the case in the supporting brief of the Petitioner, Pages 15-19 of the Petition for Writ of Certiorari, is substantially correct. We think it unnecessary to add thereto.

BRIEF OF ARGUMENT

Summary of Argument

1. The alleged constitutional questions relied upon by Petitioner, are not and were not substantial in character; but on the contrary, were too flimsy and unsubstantial to merit the attention of the Supreme Court of Texas which based its decision upon other and controlling grounds.

2. Although the record may show that the Petitioner contended and claimed that the judgment of the Supreme Court of Texas impaired the obligation of a contract, and violated the provisions of the CONSTITUTION OF THE UNITED STATES, and although Petitioner avers in its Petition for Writ of Certiorari that "The Supreme Court of Texas, the highest court of the state, has rendered final judgment in favor of the validity of Ordinance 129 of the City of West University Place, Texas, overruling all questions raised and denying all rights set up and claimed under the FEDERAL CONSTITUTION by Petitioner against said ordinance," it does not appear that any Federal question was both raised *and actually decided*, and that the court's decision was necessary to the de-

termination of the cause, or that the judgment rendered could not have been given without deciding it.

3. The Supreme Court of Texas properly held that the ordinance in question was not so unreasonable as a matter of law as to render it invalid. It is well established that the reasonableness or unreasonableness of such an ordinance is a matter for the determination of the courts.

4. The burden is on the Petitioner to overcome the presumption of facts supporting constitutionality, which attaches to all legislative acts; and this Honorable Court will not assume that the rental charge in question is excessive so as to make the ordinance in question unreasonable and void.

5. The ordinance in question does not impair the obligation of contracts because the franchise in question was granted and accepted under the Texas law as contained in Art. I, Sec. 17 of the CONSTITUTION OF TEXAS prohibiting the irrevocable or uncontrollable grant of special privileges or immunities, which provision must necessarily be read into the franchise in question.

6. The ordinance in question is not repugnant to Sec. 1 of the Fourteenth Amendment to the FEDERAL CONSTITUTION in that

(a) Its enactment and enforcement does not deprive Petitioner of the use of its franchise without due process of law;

(b) The franchise was at all times subject to modification and regulation by the City of West University Place, as it otherwise would constitute an irrevocable or uncontrollable grant of a special privilege or immunity in violation of Sec. 17 of the Bill of Rights (Art. I), of the TEXAS CONSTITUTION;

(c) The rental charge provided for in the ordinance in question was and is reasonable—certainly not so unreasonable as to render the ordinance invalid.

ARGUMENT

1.

The alleged constitutional questions relied upon by the Petitioner, are not and were not substantial in character; but on the contrary, were too flimsy and unsubstantial to merit the attention of the Supreme Court of Texas which based its decision upon other and controlling grounds.

It is well settled that the Supreme Court of the United States will decline jurisdiction, although the constitutionality of a state law is formally drawn in question, when it appears that the constitutional question raised is not, and was not, at the time of granting the writ, substantial in character. ZUCHT v. KING, 260 U.S. 174; 67 L. Ed. 194. SUGARMAN v. UNITED STATES, 249 U.S. 182; 63 L. Ed. 550.

Long before this suit was instituted CITY OF ST. LOUIS v. WESTERN UNION TELEGRAPH COMPANY, 148 U.S. 92, 37 L. Ed. 380, had settled that a city has a right to charge a telegraph company for the use of its streets and public places for telegraph poles erected therein. In such case, this Court further held, that prima facie such an ordinance was reasonable. As stated in the opinion of MR. JUSTICE BREWER:

> "The court cannot assume that such a charge is excessive, and so excessive as to make the ordinance unreasonable and void; for, as applied in certain cases, a like charge for so much appropriation of the streets may be reasonable."

In the instant case, the charge made by the City of West University Place under the ordinance in question, was based

upon the amount of service rendered and electricity furnished within the corporate limits of the city itself. It is respectfully submitted that a fairer method of imposing a charge for the use of the city's streets could hardly be found, as such charge would be determined by the gross earnings of the company, which in turn would be based upon the amount of service actually used in the city.

While the charge in question is in the nature of a rental for the use of the streets and other property of the city, it is submitted that there is no practical difference between it and franchise taxes imposed upon a utility in so far as the method of estimating and determining the charge is concerned. It has been held by this Honorable Court that a local law imposing a franchise tax measured by gross income, against "utilities", did not deny equal protection or due process of law to transit corporations, notwithstanding that they were subject to competition from city transit lines and taxicabs and had a smaller margin of profits than other utilities and contractural inhibitions against raising fares. NEW YORK TRANSIT CORPORATION v. CITY OF NEW YORK, 58 S. Ct. 721, 303 U.S. 573, 82 L. Ed. 1024. BROOKLYN & QUEEN'S TRANSIT CORPORATION v. CITY OF NEW YORK, 58 S. Ct. 721, 303 U.S. 573, 82 L. Ed. 1024. [1]

[1]A state tax on the annual gross earnings of railroads held to be a property tax, is valid. GREAT NORTHERN RAILWAY COMPANY v. STATE OF MINNESOTA, 49 S. Ct. 191, 278 U.S. 503, 73 L. Ed. 477.

It has been held that an ordinance imposing an annual license tax on the privilege of carrying on a telephone business of Four (4%) per cent of the gross income of the business in the city during the preceding fiscal year, was not so vague and indefinite as to infringe due process of law. PACIFIC TELEPHONE AND TELEGRAPH COMPANY v. CITY OF SEATTLE, 54 S. Ct. 383, 291 U.S. 300, 78 L. Ed. 810.

See also NEW YORK RAPID TRANSIT CORPORATION v. CITY

In the instant case, counsel for Petitioner, filed in the Supreme Court of Texas a motion to certify that Federal Constitutional questions were raised, entertained and overruled (R. 120 and 121). The Respondent herein duly filed a contest to such motion, and among other things, stated that in reality no Federal Constitutional questions were presented by the facts of this case (R. 122, 123). On January 22, 1941, the Supreme Court of Texas overruled the motion to certify, thereby in effect finding and holding that in reality no Federal Constitutional questions, at least of a substantial nature, are presented by the facts of the instant case (R. 122-123).

The franchise in question was granted to the Petitioner by the City of West University Place and accepted in May, 1930. It was thus granted and accepted under Sec. 17, Art. I of the CONSTITUTION OF TEXAS which provides that no irrevocable or uncontrollable grant of special privileges or immunities, shall be made. In SAN ANTONIO TRACTION COMPANY v. ALTGELT, 200 U.S. 304, 50 L. Ed. 491, this Honorable Court sustained the Civil Court of Appeals of Texas (SAN ANTONIO TRACTION COMPANY v. ALTGELT, 81 S.W. 106) in a construction of such constitutional provision, and in substance held that the franchise of the San Antonio Street Railway, even if construed as a contract, was still subject to such Constitutional provision, and that, therefore, such franchise was subject to further legislative control on the part of the City of San Antonio.

We respectfully submit that the ALTGELT case is conclusive of the matter, and that under such decision, which has never

OF NEW YORK, 9 N.E. (2d) 858, 275 N.Y. 258, followed in BROOKLYN AND QUEEN'S TRANSIT CORPORATION v. CITY OF NEW YORK, supra, in which a statute imposing a Three (3%) per cent gross income tax by the City of New York against transit companies, was held not to be so burdensome as to constitute taking property without due process of law.

been departed from by this Court, there can be no Federal question, and certainly no Federal question of a substantial nature, involved in the instant suit.

To like effect are CITY OF HOUSTON v. SOUTHWESTERN BELL TELEPHONE CO., 259 U.S. 318, 66 L. Ed. 961; CITY OF SAN ANTONIO v. SAN ANTONIO PUBLIC SERVICE CO., 255 U.S. 547, 65 L. Ed. 777 (affirming 257 Fed. 467); CITY OF TEXARKANA, TEXAS v. ARKANSAS-LOUISIANA GAS CO., 306 U.S. 188, 83 L. Ed. 598.

Clearly under these decisions, there is no Federal question of a substantial nature to be decided in the instant case, since the contention of Petitioner has been repeatedly determined adversely to it by this Court.

2.

Although the record may show that the Petitioner contended and claimed that the judgment of the Supreme Court of Texas impaired the obligation of a contract, and violated the provisions of the CONSTITUTION OF THE UNITED STATES, and although Petitioner avers in its Petition for Writ of Certiorari that "The Supreme Court of Texas, the highest court of the state, has rendered final judgment in favor of the validity of Ordinance 129 of the City of West University Place, Texas, overruling all questions raised and denying all rights set up and claimed under the FEDERAL CONSTITUTION by Petitioner against said ordinance," it does not appear that any Federal question was both raised *and actually decided*, and that the court's decision was necessary to the determination of the cause, or that the judgment rendered could not have been given without deciding it.

The case of HONEYMAN v. HANAN, 300 U.S. 14; 81 L. Ed. 476, is controlling. In this case, in which the opinion was written by MR. CHIEF JUSTICE HUGHES, it is held that before the Supreme Court of the United States may undertake

to review a decision of a court of a state, it must appear affirmatively from the record, not only that the Federal question was presented for decision to the highest court of the state having jurisdiction, but that its decision of the Federal question was necessary to the determination of the cause. In the instant case, it does not appear from the record or otherwise that the decision of a Federal question was necessary to the determination of the cause, and that such Federal question was actually decided, or that the judgment as rendered could not have been given without deciding it.

See BROWN v. ATWELL, 92 U.S. 327, 23 L. Ed. 511, referred to by MR. CHIEF JUSTICE HUGHES in HONEYMAN v. HANAN, supra, in which this Honorable Court laid down the rule:

> "We have often decided that it is not enough to give us jurisdiction over the judgments of the state courts for the record to show that a Federal question was argued or presented to that court for decision. It must appear that its decision was necessary to the determination of the cause, and that it was actually decided or that the judgment as rendered could not have been given without deciding it."[1]

In MCGOLDRICK v. COMPAGNIE GENERAL TRANSATLANTIQUE, 309 U.S. 430-435; 84 L. Ed. 849, this Honorable Court through MR. JUSTICE STONE stated:

> "But it is also the settled practice of this court, in the exercise of its appellate jurisdiction, that it is only in exceptional cases, and then only in cases coming from the Federal courts, that it considers questions urged by a

[1]To like effect see COMMERCIAL NATIONAL BANK v. BUCKINGHAM, 5 How. 341, 12 L. Ed. 180; LAWLER v. WALKER, 14 How. 154, 14 L. Ed. 366; Miss. & M. R. Co. v. ROCK, 4 Wall. 177, 18 L. Ed. 381; PARMELEE v. LAWRENCE, 11 Wall. 38, 20 L. Ed. 49.

> petitioner or appellant not pressed or passed upon in the courts below."

This Court in the same case further said in substance that in cases coming to the Supreme Court of the United States from the state courts in which a state statute is assailed as unconstitutional, there are reasons of peculiar force "which should lead us to refrain from deciding questions not presented or decided in the highest court of the state whose judicial action we are called upon to review."

3.

The Supreme Court of Texas properly held that the ordinance in question was not so unreasonable as a matter of law as to render it invalid. It is well established that the reasonableness vel non of such an ordinance is a matter for the determination of the courts. FLEMING, ET AL., v. HOUSTON LIGHTING & POWER COMPANY, 138 S.W. (2d) 520 (R. 111); STATE v. CITY OF LARAMIE, 275 P. 106, 40 Wyo. 74; EX PARTE HALL, 195 P. 975, 50 Cal. App. 786.

The charge based upon Four (4%) per cent of the gross revenues of the Petitioner's business within the city is not arbitrary or excessive. Both the amount of the charge and the method of arriving at it, are, we submit, reasonable. It is a matter of common knowledge that rentals are frequently based upon a percentage of the gross earnings of the tenant. This method is gaining in popularity, because it is becoming an accepted fact that this basis presents a fair and reasonable method of computing the charge.

The ordinance in question calls for a rental of Four (4%) per cent of the gross earnings of the Petitioner. The payment required by the ordinance in controversy does not constitute a charge for the privilege of doing business. The Petitioner has the right and power to acquire private easements on the rear of the various lots within the city and move its poles on

these private easements and continue with its business. It could thus continue its business without the ordinance in controversy having any application. A similar situation is presented in CITY OF ST. LOUIS v. WESTERN UNION TELEGRAPH COMPANY, supra. In that case a Five and 00/100 ($5.00) Dollars charge was imposed for each and every telegraph or telephone pole erected or used in the streets, alleys and public places in the city. It was contended that a charge of Five and 00/100 ($5.00) Dollars per pole was grossly excessive and that such charge was for the privilege of doing business within the city. This Court held, however, that the charge was more in the nature of a charge for the use of property belonging to the city and that the city was seeking to collect rent.

In SOUTHWESTERN TELEGRAPH AND TELEPHONE COMPANY v. CITY OF DALLAS, 174 S.W. 636, error refused, certiorari dismissed by the Supreme Court of the United States, the ordinance of the City of Dallas levying a charge of Two and 00/100 ($2.00) Dollars per pole and Twenty-five (25c) cents per wire per mile was declared to be a rental charge for the use of the streets. This was likewise held in MUNICIPAL GAS COMPANY v. CITY OF WICHITA FALLS, 88 S.W. (2d) 608, wherein there was in controversy a practically identical ordinance levying a rental charge based upon Five (5%) per cent of the gross income of the utility from its business within the city. In TULANE COUNTY v. CITY OF DENUBA (Cal.), 206 Pac. 983, it was held that the imposition of a gross receipts charge by a municipality for the privilege of using its streets was not a tax, but was a charge in the nature of a rental. There are numerous other authorities holding that a gross receipts charge for the use of the streets of a city does not constitute a tax but a rental charge.

There is no basis, we submit, for any differentiation between a rental charge based upon a percentage of the gross

earnings of the company and a charge of Five and 00/100 ($5.00) Dollars per pole and a certain designated amount for each mile of wire within the city as in the case of SOUTHWESTERN TELEGRAPH AND TELEPHONE COMPANY v. CITY OF DALLAS, supra. The Supreme Court of Texas in the instant case in its opinion clearly shows that the material inquiry is not the method used to measure the rental charge but rather the reasonableness of such charge.[1]

Certainly there is nothing to show that the charge of Four (4%) per cent of the gross earnings of the Petitioner is unreasonable. In TULANE COUNTY v. CITY OF DENUBA, supra, a Two (2%) per cent annual gross receipts rental charge was made. In MITCHELL v. DAKOTA CENTRAL TELEPHONE COMPANY, 25 S.D. 409, 127 N.W. 582, the Supreme Court of South Dakota held that a payment of Ten (10%) per cent of the gross receipts from the company's business was not a tax nor a license but was in the nature of a rental or compensation for the use of the streets. It is manifest in the instant case that Petitioner has utterly failed to show that the Four (4%) per cent charge is unreasonable.

4.

The burden is on the Petitioner to overcome the presumption of facts supporting constitutionality, which attaches

[1] (R. 111). "We have also concluded that the ordinance is not invalid merely because it provides for measuring the amount of the rental charge by a percentage (4%) of the gross receipts of the business tranacted by the company in the city. In the case of Municipal Gas Company v. City of Wichita Falls, 88 S.W. (2d) 608, an ordinance was upheld which measured the charge by a 5% of the gross receipts . . . It is thus established that the material inquiry is not the method to use to measure the rental charge, but rather the reasonableness of such charge." FLEMING, ET AL, v. HOUSTON LIGHTING & POWER CO., 138 S.W. (2d) 520.

to all legislative acts. LAWRENCE v. STATE TAX COMMISSION, 286 U.S. 276-283, 76 L. Ed. 1103. This Honorable Court, we respectfully submit, will not assume that the rental charge in question is excessive so as to make the ordinance in question unreasonable and void. CITY OF ST. LOUIS v. WESTERN UNION TELEGRAPH COMPANY, 13 S. Ct. 485, 148 U.S. 92, 37 L. Ed. 380.

5.

The ordinance in question does not impair the obligation of contracts because the franchise in question was granted and accepted under the Texas law as contained in Art. I, Sec. 17 of the CONSTITUTION OF THE STATE OF TEXAS prohibiting the irrevocable or uncontrollable grant of special privileges or immunities and such Constitutional provision must necessarily be read into such franchise or contract. The Petitioner received its franchise under the Texas Constitution of 1876, Sec. 17, Art. I, which reads as follows:

> "No person's property shall be taken, damaged or destroyed for or applied to public use without adequate compensation being made, unless by the consent of such person; and when taken, except for the use of the state, such compensation shall be first made, or secured by a deposit of money; and no irrevocable or uncontrollable grant of special privileges or immunities shall be made; but all privileges and franchises granted by the legislature or created under its authority shall be subject to the control thereof."

There can be no doubt but that the franchise granted by the City of West University Place to the Petitioner is in legal acceptation a special privilege. MAYOR OF THE CITY OF HOUSTON v. HOUSTON STREET RAILWAY COMPANY, 19 S.W. 127, 129, decided by the Supreme Court of Texas.

By virtue of Art. I, Sec. 17 of the CONSTITUTION OF

TEXAS, no irrevocable or uncontrollable grant of special privileges or immunities shall be made. This constitutional provision has been construed many times by the Supreme Court of Texas and has also been construed by the Supreme Court of the United States, and both courts have uniformly held that the foregoing provision of the Constitution of this State precludes a City from making any irrevocable grant of a franchise or a special privilege.

In SAN ANTONIO TRACTION COMPANY v. ALTGELT, supra, this Honorable Court held in substance that assuming that the ordinance of March 16, 1899, extending the franchise of the San Antonio Street Railway, and imposing certain limitations, constituted a contract pro tanto, the question still remained whether the provision that said street railway company shall charge Five (5c) cents fare for one (1) continuous ride over any of their lines, with one (1) transfer to or from either line to the other, constituted a contract with respect to which no further legislation upon that subject could be enacted without impairing its obligation. The Court then proceeded to hold that even if construed as a contract, it was still subject to a provision of the Texas Constitution of 1876, which in Sec. 17 of the Bill of Rights, declares that no irrevocable or uncontrollable grant of special privileges or immunities shall be made, but that all privileges granted by the legislature or created under its authority shall be subject to the control thereof. This Court further held that the municipality received its franchise under the Constitution of 1876, and that it was not deprived of that control by the fact that the contract was not entered into by the legislature itself, but by a municipal corporation, since a municipal corporation is but an agency of the state, to which is delegated the power to regulate street railways and other municipal franchises.

It is manifest that in the instant case the franchise in ques-

tion as well as the city ordinance must be construed under and in light of the TEXAS CONSTITUTION OF 1876. Hence it follows that such franchise was under further legislative control of the City of West University Place.

The Supreme Court of the United States has never digressed from its construction of Art. I, Sec. 17 of the CONSTITUTION OF TEXAS as indicated in the ALTGELT case. This being true, a franchise granted by a municipality is subject to further legislative control, without violating the constitutional provision forbidding the impairment of the right of contract.[1]

[1]In SAN ANTONIO TRACTION COMPANY v. ALTGELT, 200 U.S. 304, 50 L. Ed. 491, the Supreme Court of the United States, in affirming the judgment of the TEXAS COURT OF CIVIL APPEALS, 81 S.W. 106, in the opinion written by MR. JUSTICE BROWN stated, "Assuming, but not deciding, that the ordinance of March 16, 1899, extending the franchise of the San Antonio Street Railway, and imposing certain limitations, constituted a contract pro tanto the question still remains whether the provision 'that said street railway companies shall charge 5 cents fare for one continuous ride over any one of their lines, with one transfer to or from either line to the other,' constituted a contract with respect to which no further legislation upon that subject could be enacted without impairing its obligation. Even if construed as a contract, it was still subject to the provision of the Constitution of 1876, which in Section 17 of the Bill of Rights, declared that no irrevocable or uncontrollable grant of special privileges or immunities should be made; but that all privileges granted by the Legislature or created under its authority shall be subject to the control thereof.

"An important consideration in this connection is that the alleged contract was made twenty-three years after the Constitution of 1876 was adopted, declaring that all privileges granted by the legislature shall be subject to its control. Clearly, it was not deprived of that control by the fact that the contract was not entered into by the Legislature itself,

It is respectfully submitted that the case of SAN ANTONIO TRACTION CO. v. ALTGELT, is controlling of the instant case and is a complete answer to the contention of the Petitioner.

In the case of CITY OF HOUSTON v. SOUTHWESTERN BELL TELEPHONE COMPANY, 259 U.S. 318, 66 L. Ed. 961, the same rule is declared in the use of this language:

> "It has been definitely decided that, while municipal corporations in Texas, as agencies of the state, may have the power to prescribe rates for public service corporations, this provision of the Constitution (Sec. 17, Art. I) prohibits their making contracts for the future which may not be modified at any time by appropriate action of the municipality."

This Honorable Court again had occasion to construe this provision of the Texas Constitution. It was in the case of the CITY OF SAN ANTONIO v. SAN ANTONIO PUBLIC SERVICE

but by a municipal corporation, since that is but an agency of the state, to which is delegated the power to regulate street railways and other municipal franchises.

"We are clearly of the opinion that, under these circumstances, it received its franchise under the Constitution of 1876, which forbade either the Legislature or the municipal authorities to make any irrevocable contract.

"It is true that in this ordinance it was provided that all rights and privileges previously granted to the street railway company and the Edison company were conferred unto the traction company, including all the limitations, contracts, and obligations; but this ordinance must be construed in connection with the Constitution of 1876, which made all such privileges and franchises subject to the control thereof. Such was the view taken by the Court of Civil Appeals of Texas in this case, which expressly waived the question whether the provisions of the former ordinance fixing a five cents fare constituted a contract or not, declaring that if it did, it was subject to further legislative control."

COMPANY, 255 U.S. 547, 65 L. Ed. 777 (affirming 257 Fed. 467). This Court in that case re-affirmed the proposition that Art. I, Sec. 17 of the Constitution of Texas prohibits the city from granting a special privilege which it cannot thereafter impair by future regulation.

In the case of STORRIE v. STREET RAILWAY COMPANY, 46 S.W. 796, decided by the Supreme Court of Texas, it is held that under Art. I, Sec. 17 of the Constitution of Texas, the Legislature had the right to amend the Houston City Charter so that a street car company became liable for the cost of paving six (6) inches on each side of its tracks in addition to its former liability of paving between the rails, and such law was not unconstitutional as impairing the obligation of a contract.

The latest announcement of this Honorable Court on this question is that contained in the opinion rendered by this Court in the case of CITY OF TEXARKANA v. ARKANSAS-LOUISIANA GAS COMPANY, 306 U.S. 188, 83 L. Ed. 598. MR. JUSTICE REED delivered the opinion of this Court, and the doctrine repeatedly announced by the Supreme Court of Texas that a franchise granted by a city is subject to modification without impairing the obligation of a contract by virtue of the reserved power given in Art. I, Sec. 17 of the Texas Constitution, is expressly approved. MR. JUSTICE REED very forcibly says that in Texas every utility company accepts its franchise with full knowledge that the municipality granting it reserves the power of future regulation. In this connection, he says:

> "The utility was chargeable with notice in 1930 of the rule in Texas, re-stated in the Texarkana Charter, that rate regulatory power remains in the municipality and the charter provision to that effect was reserved in the franchise by force of law."

From the foregoing language, it is clear that the ordinance

in question cannot be held to impair the obligation made by the City in granting the Petitioner a right to use its streets because the power to modify or alter such grant was necessarily reserved to the City by the express terms of the organic law of the State of Texas, and the Petitioner was chargeable with notice of this reserved power.

The principal case relied upon by Petitioner is that of RUSSELL v. SEBASTIAN, 233 U.S. 195, 58 L. Ed. 912. The basis for distinguishing that case from the case now before this Court is perfectly clear. It is this: In that case, the contract granting the gas company a franchise to use the city streets, which it was held could not be subsequently impaired, was made by a provision of the Constitution of the State of California. The contract was duly accepted by the gas company and large expenditures were made by it in carrying out its part of the contract. No character of regulation or control was reserved to the state or municipal authorities, except to regulate taxes. Subsequently the provision of the Constitution was amended and the city, acting thereunder, attempted by ordinance to prevent the gas company laying its pipes in the streets without having obtained a further grant from the city. Of course, it was held that the people of California through the supreme law of the state had made a solemn contract with the gas company which it could not later amend by adopting another constitutional provision. The State of California had no provision in its constitution like that in Texas hereinabove set out. It is submitted that this Court could not have reached any other conclusion in RUSSELL v. SEBASTIAN than that a contract made by the people of a state through the supreme law, the Constitution itself, was binding on both parties and could not later be abrogated or impaired by subsequent enactment.

In this state, a utility company cannot be misled into relying upon the grant of its franchise being irrevocable. It must

take notice that the state and all of its municipal subdivisions are expressly prohibited by the Organic law of the state from making any "uncontrollable grant of special privileges or immunities" and that "all privileges and franchises granted by the Legislature or created under its authority" are expressly subject to subsequent control.

The decisions of the courts in construing Art. I, Sec. 17 of the Texas Constitution make it perfectly plain that the franchise granted by the City of West University Place to the Petitioner, Houston Lighting & Power Company, cannot be given the effect to vest in the Power Company an irrevocable and uncontrollable right to keep and maintain its poles upon the streets of the City forever free from every kind and character of regulation which the governing body of the City might deem advisable in the interest of the public welfare.

6.

The ordinance in question is not repugnant to Sec. I of the Fourteenth Amendment to the Federal Constitution in that

(a) Its enactment and enforcement does not deprive Petitioner of the use of its franchise without due process of law;

(b) The franchise was at all times subject to modification and regulation by the City of West University Place, as it otherwise would constitute an irrevocable or uncontrollable grant of a special privilege or immunity in violation of Sec. 17 of the Bill of Rights (Art. I), of the TEXAS CONSTITUTION;

(c) The rental charge provided for in the ordinance in question was and is reasonable—certainly not so unreasonable as to render the ordinance invalid.

This Honorable Court in SAN ANTONIO TRACTION COMPANY v. ALTGELT, supra, and other cases cited, has held that under the Texas Constitution, Art. I, Sec. 17, a franchise granted by a municipality is subject to further legislative control without impairment of the obligation of a contract since the contract would have to be construed under such constitutional provision. This being true, the ordinance in question, imposing a rental charge upon the Petitioner for the use of the streets and other property of the city, does not constitute taking property without due process of law in violation of Sec. I of the Fourteenth Amendment.

The question then resolves itself into the reasonableness vel non of the ordinance, and we respectfully submit that there is no evidence that such ordinance is unreasonable, and certainly this Honorable Court will not assume that it is. ST. LOUIS v. WESTERN UNION TELEGRAPH COMPANY, supra.

Counsel for Petitioner say on Page 25 of their supporting brief that "by paying the rental, Petitioner can get the maximum franchise privileges which the rental ordinance permits, and this would be true if Petitioner had no franchise and was a naked trespasser upon City's streets." This is certainly not a correct statement of the fact. The Petitioner still has its franchise and it has the right to operate thereunder. It has not been deprived of its franchise—it is merely charged a rental for the use of the City's streets. It could operate without use of the City's streets. The Petitioner has the statutory right and power to condemn property for its use. If it sees fit, it can certainly exercise its legal rights in this respect and acquire property for the purpose of placing its poles thereon and in this manner proceed with its business within the city without paying any rental whatever. The ordinance in question simply provides that every person, etc., "occupying or using the streets, highways, easements, alleys, parks or other public places," in the City, "with poles, pipe

and other fixtures" shall as a condition to such further occupancy of such streets, highways, etc., pay rental equal to Four (4%) per cent of the gross receipts received from its business within the city. The occupancy of the streets, etc., by the poles of the light company is the basis and only basis, for the rental. If the Petitioner places its poles off the public streets, highways, easements, alleys, parks or other public places within the city, as indicated by the Petitioner's own witness could be done (R. 86), and which the Petitioner has the legal right to do by the condemnation or acquisition of property, if not otherwise, the Petitioner could then continue its business and avoid payment of all rental. It is very plain that the rental is based, as stated, upon an appropriation by the Petitioner of a portion of such public streets, highways, easements, alleys, parks or other public places. It is thus seen that there is no basis for the attempted differentiation between the instant case and CITY OF ST. LOUIS v. WESTERN UNION TELEGRAPH COMPANY, supra.

While there are numerous cases which hold that a rental based upon gross receipts instead of a flat rate, forms a proper rental charge, we have failed to find, and counsel for Petitioner have failed to cite a single case wherein a rental has been held not a rental or unreasonable just because the method in arriving at the amount of such rental is based upon the gross receipts of the business instead of a flat rate per pole[1].

[1]In CITY OF SPOKANE v. SPOKANE GAS AND FUEL COMPANY (Cal.), 26 Pac. (2d) 1034, where the court had under consideration a franchise which gave the city the right to fix a gross receipts charge for the use of the streets, and pursuant thereto, the city had passed an ordinance providing for 2% gross receipts charge, it was said, "Such charges as these have been quite generally held to be in the nature of rental for the use and occupancy of the streets (citing numerous authorities). The correct rule as stated under the title "Telegraphs and telephones (62 CORPUS JURIS, page

Respondent prays that certiorari be denied and in the alternative for affirmance.

Respectfully submitted,

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47) distinguished from tax and license fee. A charge imposed upon a company for the use of the streets, by whatever name it may be called, is of the nature of rental or compensation, and is not a tax on the company, its property, or the privilege of doing business nor is it of the nature of a license fee to cover the expense of regulation and supervision, but is imposed by virtue of the proprietary right, rather than of any governmental power of the state or municipality."

In McQUILLIN, MUNICIPAL CORPORATIONS, Second Edition, Volume 4, Section 1772, it is said: "A municipal corporation, having entire control of its streets and power to impose conditions on granting a franchise to use the streets, may require compensation for their use by public service companies, as a condition of the grant of the right to use them, unless forbidden by statute, AS BY REQUIRING THE COMPANY TO PAY A CERTAIN PORTION OF ITS RECEIPTS AS COMPENSATION FOR THE USE OF STREETS * * * "

See CITY OF MEMPHIS v. POSTAL TELEGRAPH CABLE COMPANY, 145 Fed. 602, decided by the Circuit Court of Appeals, Sixth Circuit; CITY AND COUNTY OF DENVER v. STENGER, 295 Fed. 809 (Circuit Court of Appeals, Eighth Circuit), holding that the charge for the use of the streets was in the nature of a rental and not a tax.